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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-879

THE STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

THE HONORABLE PETER J. BRENNAN,
Appellee.

On Appeal from the United States
District Court for the District of Columbia

JURISDICTIONAL STATEMENT OF APPELLANT STATE OF CALIFORNIA

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JURISDICTIONAL STATEMENT OF APPELLANT STATE OF CALIFORNIA

Appellant State of California appeals from the Judgment of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing with prejudice both the Complaint of the National League of Cities, et al., as amended, and the Complaint in Intervention of the State of California. This Statement is respectfully submitted by appellant State of California to demonstrate the Honorable Court's jurisdiction of the appeal, and the presence of a federal question of such substance and magnitude as to warrant its immediate consideration and disposition by the Court.

OPINION BELOW

The Per Curiam opinion of the United States District Court for the District of Columbia, dated December 31, 1974, is not yet reported and, for that reason, a true and correct copy thereof is appended hereto as "Exhibit A" of the Appendix.

JURISDICTION

The action below was brought pursuant to the provisions of 28 U.S.C. §§ 1331, 1337, 1346, 2201 and 2202, as well as the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States.

A three-judge district court was convened below pursuant to 28 U.S.C. § 2282. Appellant State of California filed a Notice of Appeal from the adverse Judgment of the court on January 8, 1975, a true copy of which is appended hereto as "Exhibit B" of the Appendix.

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §§ 1253 and 2101(b), providing for direct appeal to the United States Supreme Court from an order of a district court of three judges denying interlocutory or permanent injunctive relief in a civil action or proceeding properly brought under an Act of Congress regulating commerce (28 U.S.C. § 1337). The decisions of this Court sustaining jurisdiction, under facts similar to those presented here, are well established. *Maryland* v. *Wirtz,* 392 U.S. 183 (1968); *Carter* v. *Stanton,* 405 U.S. 669 (1972).

QUESTION PRESENTED

SHALL THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, BE APPLIED TO ALL EMPLOYEES OF STATE AND LOCAL GOVERNMENTS UNDER THE COMMERCE CLAUSE SO AS TO REGULATE INDISPENSABLE SOVEREIGN FUNCTIONS (SUCH AS FIRE SUPPRESSION AND LAW ENFORCEMENT) WHICH, UNLIKE THOSE PRESENTED IN MARYLAND v. *WIRTZ*, 392 U.S. 183 (1968), *ARE NOT IN COMPETITION WITH PRIVATE INDUSTRY AND HAVE NO RATIONAL CONNECTION WITH COMMERCE?*

STATUTES INVOLVED

The pertinent sections of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93–259; 88 Stats. 55)[1], the subject of the suit below, are set forth in full as "Exhibit C" of the Appendix herein.

STATEMENT OF THE CASE

By a Complaint for Declaratory Judgment, together with an Application for Preliminary Injunction, appellant National League of Cities, et al. filed this action in the United States District for the District of Columbia seeking injunctive and declaratory

[1] The sections referred to above amend or repeal various sections of the Fair Labor Standards Act of 1938 (29 U.S.C. §§ 201–219). The principal amendments in issue are those which are part of Section 6 of the Fair Labor Standards Act Amendments of 1974 (Pub. L. 93-259) entitled "Federal and State Employees". The precise sections of Title 29, United States Code, affected by the Amendments are set forth in the Appendix, "Exhibit C".

relief against various provisions (see "Exhibit C" of Appendix) of the Fair Labor Standards Act Amendments of 1974 which, for the first time in the 36-year history of the Fair Labor Standards Act of 1938, sought to impose federal restrictions on the wages, hours, and working conditions of *all* Federal, State, and local government employees. A three-judge District Court was duly convened (28 U.S.C. § 2282) and the matter of the preliminary injunction was set for December 30, 1974.

By an Order dated December 26, 1974, the Court granted the Motion of Appellant State of California to intervene as a party plaintiff and to fully participate in the Application for Preliminary Injunction set for December 30, 1974. The Complaint in Intervention of appellant State of California was also filed and served on that date; the State's Application for Preliminary Injunction was filed on December 27, 1974.

Defendant Secretary of Labor, Peter J. Brennan, filed on December 27, 1974, a Motion to Dismiss the Complaint, and an Opposition to the Application for Preliminary Injunction. The Motion to Dismiss was also set to be heard contemporaneously with plaintiffs' Application for Preliminary Injunction.

On December 30, 1974, the Applications of plaintiffs and plaintiffs-intervenors for a Preliminary Injunction, as well as defendant's Motion to Dismiss, came on regularly for hearing before United States Circuit Judge Harold Leventhal and United States

District Judges Oliver Gasch and Barrington Parker. At that time, seventeen additional states were permitted to intervene as plaintiffs with the stipulation that, except as to plaintiff State of California, service of all pleadings on said intervening states would be effective by service on counsel for plaintiff National League of Cities, Mr. Charles Rhyne. Several depositions and affidavits were received into evidence and the matter was argued and submitted for decision.

On December 31, 1974, the three-judge District Court below, in a Per Curiam Opinion, denied the Applications for Preliminary Injunction and dismissed the Complaint, as amended,[2] and the Complaint in Intervention (See "Exhibit A" of Appendix).

Appellants National League of Cities, et al. (and the intervening states) filed their Notice of Appeal on December 31, 1974. The Notice of Appeal of appellant State of California was filed on January 8, 1975 (See "Exhibit B").

THE QUESTION BEFORE THE COURT IS SUBSTANTIAL.

1. *Background.* Since 1966, employees of State and local schools, colleges, hospitals, and other health care institutions have been subject to the wage-hour

[2] The Court's Opinion ("Exhibit A") was also addressed to an Amendment to paragraph 39 of the Complaint of plaintiff National League of Cities, which alleged a violation of the Fifth Amendment, United States Constitution, for the failure of defendants to give proper notice of its regulations (29 C.F.R. § 553, *et seq.*) prior to their effective date. The formal regulations pertaining to fire and police personnel were not published in the Federal Register until December 20, 1974, a mere eleven days before their date of implementation, January 1, 1975.

provisions of the Fair Labor Standards Act of 1938 (52 Stats. 1060; 29 U.S.C. § 201 *et seq.*), as amended. In *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), this Court held that such legislation could be supported as a scheme necessary to protect commerce and to promote labor peace; that labor conditions in schools and hospitals can affect commerce; and that Congress interfered with state functions only to the extent that it subjected the states to the same wage and overtime limitations as private employers who were engaged in *the same* economic activities.

On April 8, 1974, the President signed Amendments to the Act (Pub. L. 93-913; 88 Stats. 55), effective May 1, 1974, extending the minimum wage and overtime provisions of the Act to *all* Federal, State, and local government employees, except as to those employees who serve in "executive, administrative, or professional" capacities. Fire protection and law enforcement personnel (including correctional personnel) were provided an exemption under section 13(b)(20) of the Act (29 U.S.C. § 213(b)(20)) until January 1, 1975, at which time such personnel were required to be *paid* premium overtime for tours of duty in excess of 240 hours in a work period of 28 days (60 hours for 7 days, or in a ratio of 240/28 for work periods between 7 and 28 days). By the new Amendments, in January of the following two years (1976 and 1977), premium compensation will have to be *paid* for work performed in excess of 232 and 216 hours, respectively, including ratios for premium pay

for work performed beyond a 7-day work period. The new amendments do not require weekly or semi-monthly payments; however, minimum wage and overtime will be computed on the basis of hours worked each workweek.[3] Compensatory time off ("C.T.O.") taken in a later pay period does not meet the Act's new overtime provisions.

2. *Effect of the Subject Amendments on the State of California.* The Fair Labor Standards Act Amendments of 1974 will severely limit, if not altogether eliminate, the ability of the State of California to recognize the overtime hours of its employees in forms other than cash compensation. Numerous California statutes will be superseded and nullified by the federal amendments. For example, California Government Code sections 18021.5 and 18023 allow the California State Personnel Board to provide for *either* cash compensation or compensating time off ("C.T.O.") at 1½ times the regular rate of pay or hours worked; C.T.O may be taken up to a period of *12 months* following the overtime worked. Under the federal amendments, C.T.O. *must* be taken in a *28-day* work period or such personnel must be *paid* premium overtime.

The federal statute, in one stroke, works to the disadvantage of employer and employee. The State's

[3] A "workweek" is a regular recurring period of 168 hours in the form of seven consecutive 24-hour periods. "Hours worked" includes all time an employee is required to be on duty or on the employer's premises, at a prescribed workplace, and all times during which the employee is suffered or permitted to work. 29 U.S.C. § 207.

extended fire season (of 5 to 8 months' duration) frequently requires a "campaign" fire suppression program to be waged in California's vast mountainous regions. Members of the fire suppression classes in state service receive an additional 15% "fire mission pay" and, by Government Code section 18021.7, may work *84 hours* per week (or *336 hours* per *calendar* month) before overtime rules apply. Earned C.T.O. may be taken in the inactive winter months by the employee to maintain a consistent payroll status, with its attendant benefits (such as retirement credits and the like). Yet, by the federal amendments, such employees are now restricted to *60 hours* per workweek (or *240 hours* per *28-day* work period) and are precluded from utilizing all C.T.O. which is not taken during a 28-day work period. The wishes of the employer, to maintain a reasonable cost of a crucial and indispensable function of State government, and the wishes of the employee, to provide a consistent or uniform payroll status with the State, are lost to the irrational whim of Congress.

These and other effects of the federal amendments were referred to by the lower court as follows (Slip Opinion, pages 5-6, fn. 3; see "Exhibit A"):

> "California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that coun-

ties will be unwilling to continue to cooperate in this venture.

"Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees."

The State of California, by its verified Complaint in Intervention below, alleged an estimated *8 to 16 million* dollars by reason of the extension of the Act to State government, as well as an *additional* estimated *6 million dollar* loss in the "Mutual Aid" fire program, *750,000 dollars* in California Highway Patrol Academy training, and an *inestimable* amount in meeting the record-keeping requirements of the federal Act. The National League of Cities has estimated the cost to States and Cities nationally to be approximately *200 million dollars.*[4]

[4] The Government in its Motion to Dismiss and Opposition to the Application for Preliminary Injunction alleged that the actual fiscal impact of the federal amendments on the Nation was but

3. *The Enormity of the Federal Question Before the Court.* Appellant State of California, 18 other States, and 15,000 Cities (also appellants), ask this Honorable Court to review and to reverse the attached Judgment of the three-judge District Court (Appendix, "Exhibit A") which held that by virtue of this Court's decision in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968), the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3) may be extended to permit the federal regulation of indispensable sovereign functions of State and local government (such as law enforcement and fire suppression) even though such functions are not in serious competition with private industry.

Application of the Fair Labor Standards Act of 1938 to *all* State and local employees constitutes an unprecedented interference by Congress with the rights and prerogatives of State and local government over the manner in which the wages, hours, compensable time, and other personnel matters are established and administered. The net effect is to confer upon Congress and federal administrative agencies outright control of local employees who occupy purely *governmental* positions—created by local government, paid with funds raised by local government, and performing indispensable services entirely intrastate in character.

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27 million dollars. The Government's figure is ludicrous, irrespective of the dollar accuracy of plaintiff's estimate. In any event, the constitutional question presented here—the unprecedented federal regulation of *all* State and local government employees—is of such gravity as to render such a statistical confrontation by the parties immaterial.

In *Coan* v. *State of California,* 11 Cal.3d 286, 520 P.2d 1003 (1974) the California Supreme Court found that Congress did not intend the Economic Stabilization Act of 1970 to apply to the States. Justice Mosk, taking "a firm constitutional stand for state independence in its governmental function", concurred with the majority "solely on the basis of the Tenth Amendment to the Constitution." Justice Mosk's reference to the pervasive impact of the Economic Stabilization Act on the States under the Commerce Clause is equally applicable here (at p. 1012 of 520 P.2d):

> "If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state."

The issue before the California Supreme Court in *Coan* is now before this Honorable Court in *Fry* v. *United States,* No. 73-822.[5] There, the Temporary Emergency Court of Appeals (*United States* v. *State of Ohio,* 487 F.2d 936 [T.E.C.A. 1973]) held that by virtue of *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), the Economic Stabilization Act of 1970 could be applied to the States by Congress under the Commerce Clause

[5] The State of California has filed a Brief as Amicus Curiae in Support of Petitioners in that case.

without doing violence to the sovereignty of the States guaranteed by the Tenth Amendment. Certiorari was granted and the matter has now been argued and submitted for decision. The opinion of the three-judge court in the instant case, extending this Court's language in *Wirtz* to yet another federal intrusion into the internal affairs of State government, is of no less magnitude.

In *Employees of the Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973), this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.,* 377 U.S. 184 [1964]) which upheld under the Commerce Clause federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[6] The Court refused to place the State in the position of a "proprietary" employer or to cause the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

> "It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by*

[6] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, *e.g., California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *United States* v. *California,* 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States,* 289 U.S. 48 (1933); *Sanitary District* v. *United States,* 266 U.S. 405 (1925).

lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." (Italics added.)

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Fair Labor Standards Act. The activities undertaken by the governments of the several states are principally "governmental", not "proprietary". If the State ceased to perform such services (such as fire protection and law enforcement), it is unlikely that private enterprise would step in to fill the need.

The search for a "dependable touchstone" by which to determine whether State employees are engaged in commerce or in the production of goods for commerce "is as rewarding as an attempt to square the circle." *Kirschbaum* v. *Walling,* 316 U.S. 517, 520 (1942). The crucial test, however, would appear to be the nature of the activities of the employee and the character of his work. *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564, 571–572 (1943). It needs no extended argument to demonstrate that the better part of the activities of State employees are purely intrastate in nature. In no case to the knowledge of the State of California has this Court found a connection with interstate commerce on the bold assertion by the government that it is so. In each and every case reviewed,[7] there was a significant probe into those facts

[7] See, for example, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Darby,* 312 U.S. 100 (1941).

which could conceivably form a rational basis for the federal statute in question. Indeed, in *Maryland* v. *Wirtz, supra,* 392 U.S. 183 (1968) this Honorable Court on three separate occasions recited the importance of *judicial review* of Congress' exercise of the commerce power, even in the face of Congressional findings of an effect on commerce (*Ibid.,* p. 190). It was found that Congress has (as here) in some instances left to the Courts the question of whether commerce is affected (*Ibid.,* p. 192), and that the Commerce Clause cannot be used to destroy state sovereignty (*Ibid.,* p. 196). The Court held that it would examine federal statutes to determine the existence of a "rational basis" for regarding the statute as a regulation of commerce on a case-by-case basis (*Ibid.,* p. 198).

Appellant State of California recognizes that although the activities performed by State employees are for the most part "governmental", that there may be those employees who perform some "proprietary" functions (as in *Maryland* v. *Wirtz, supra,* 392 U.S. 185 (1968) and *United States* v. *California, supra,* 297 U.S. 175 (1936)). A statute can be supported even when applied to individual members of the class whose own activities ("governmental" in nature) may not have demonstrable impact on interstate commerce (such as those who perform "proprietary" functions). See *Perez* v. *United States, supra,* 402 U.S. 146, 152–154 (1970); *United States* v. *Hunter,* 478 F.2d 1019, 1021 (7th Cir. 1973); *Mandina* v. *United States,* 472 F.2d 1110, 1113 (8th Cir. 1973).

However, to say that Congress should be permitted to control *all* sovereign functions on the basis of the presence of a small number of "proprietary" activities by State government is to subvert the holdings of this Court which require that the means selected to combat a national evil under the Commerce Clause be reasonable and appropriate. *Heart of Atlanta Motel, Inc.* v. *United States, supra,* 379 U.S. at 258.

It needs no further argument to demonstrate that the issue in this case demands the Court's attention. The learned three-judge court below, "troubled by these contentions", took great pains to formulate what it considered to be a "difficult and substantial question of law." Without more, the lower court's forthright observations on the enormity of the constitutional problems presented by the federal amendments in question cry for immediate consideration and resolution by this Court.

Respectfully submitted,

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